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No. 80-117

In the Supreme Court of the United States

OCTOBER TERM, 1979

ISHVARBHAI J. PATEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the government may appeal a mid-trial termination of a prosecution, when the termination is based on the ground that two alien witnesses were not made available to the defense for interview prior to trial.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-23) is reported at 617 F.2d 1358. The judgment of acquittal and dismissal (Pet. App. B-1 to B-8) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1980. A petition for rehearing was denied on June 27, 1980 (Pet. App. C-1 to C-2). The petition for a writ of certiorari was filed on July 25, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In an eight-count indictment filed in the United States District Court for the Central District of California, petitioner and eight others were charged with conspiracy to transport illegal aliens from Mexico into the United States, in violation of 18 U.S.C. 371, and individual acts of harboring or transporting illegal aliens, in violation of 8 U.S.C. 1324(a)(2) and (3), and aiding and abetting those offenses. After petitioner and five co-defendants pleaded not guilty, a jury was empaneled and trial commenced. On the morning of the fourth day of trial, prior to the completion of the government's case, the Assistant United States Attorney informed the district court that the government had learned that two illegal aliens who had been arrested with some of the defendants had not been made available to defense counsel for interview before trial. One of

the aliens had returned to Mexico and the other had been released in Los Angeles (Tr. 1283-1287, 1304).[1]

Following a hearing at which the latter alien was produced (Tr. 1483, 1528), the district court held (Tr. 1511-1521) that the government had violated its constitutional duty under *United States* v. *Mendez-Rodriguez*, 450 F.2d 1 (9th Cir. 1971), and *United States* v. *Tsutagawa*, 500 F.2d 420 (9th Cir. 1974). Accordingly, it invited motions to dismiss and for judgments of acquittal, both of which it granted as to all defendants on all counts (Tr. 1521-1533).

The following day, the government filed a motion to vacate the dismissal of the indictment and the judgments of acquittal on the ground that the second alien had been located in Mexico and would be available for interview by the court and defense counsel. The district court denied the motion to vacate on the ground (Tr. 1546) that production of the witnesses "would not cure the defects that have been visited upon the defendants by the misconduct," because the delay in production until the trial was underway might have prejudiced the defendants in

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[1] Prior to trial and following the designation as material witnesses to be held for trial of eight aliens who had been arrested with some of the defendants (Tr. 120-121), petitioner moved to dismiss the indictment on the ground that the government had failed to retain one witness, Nancy Sanchez. At a hearing on the motion, the government informed the district court that the witness had been located and was returning to Los Angeles (Tr. 129). The next day, the government produced Sanchez in court and made her available for interview by defense counsel (Tr. 350-351). Following an evidentiary hearing, the district court denied petitioner's motion to dismiss on the grounds (Tr. 473-476) that the motion had been rendered moot by the production of Sanchez and, in any event, there was no indication of government misconduct.

jury selection and examination of witnesses who had already testified. It further ruled (Tr. 1547-1549) that resuming trial at that point would violate the Double Jeopardy Clause.

After a temporary stay of its order to allow the government to file an emergency petition for a writ of mandamus in the court of appeals, which was denied, the district court discharged the jury (Tr. 1606-1607).

2. The government appealed. While the appeal was pending this Court decided *United States* v. *Scott*, 437 U.S. 82 (1978). Relying largely on *Scott*, the court of appeals rejected the defendants' claim that the appeal was barred by the Double Jeopardy Clause, holding (Pet. App. A-11; footnote omitted) that the district court's "judgment of acquittal" was not based on an evaluation of the government's evidence as legally insufficient to sustain a conviction, but rather "was based on constitutional grounds arising from the unavailability of potential material witnesses" and "therefore was in substance an order of dismissal, and as such is appealable." [2]

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[2] Having held that an appeal from the judgment of the district court was available to the government, the court of appeals went on to find (Pet. App. A-12 to A-14) that only one of the illegal aliens had been unavailable within the meaning of *United States* v. *Mendez-Rodriguez*, 450 F.2d 1 (9th Cir. 1971), and *United States* v. *Tsutagawa*, 500 F.2d 420 (9th Cir. 1974), and to vacate the dismissal of those counts as to which the testimony of the unavailable alien could not conceivably have benefitted the defendants (Pet. App. A-15 to A-20). While we strongly disagree with the portion of the court of appeals' decision affirming the district court's dismissal of some counts, we have not sought review in this Court. Nor does petitioner challenge the merits of the court of appeals' decision insofar as it vacated the dismissal of some counts.

ARGUMENT

Petitioner contends (Pet. 13-23) that the Double Jeopardy Clause barred the government's appeal from the district court's order of "acquittal." Specifically, he urges that the acquittal was intended to constitute an adjudication of guilt or innocence. The record refutes petitioner's claim.

In *Scott, supra*, the Court held (437 U.S. at 97, quoting *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977)) that

> [w]here the court, before the jury returns a verdict, enters a judgment of acquittal pursuant to Fed. Rule Crim. Proc. 29, appeal will be barred only when "it is plain that the District Court . . . evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction."

If the trial court does not evaluate the evidence and resolve any of the elements of the offense charged, it is irrelevant that it labels its termination of the trial an "acquittal," and, under those circumstances, appeal and retrial are not barred by the Double Jeopardy Clause. *United States* v. *Scott, supra*, 437 U.S. at 96-97; *United States* v. *Martin Linen Supply Co., supra*, 430 U.S. at 571-572.

From the record in this case, it is clear that the district court's termination of the prosecution was based on what it perceived to be the government misconduct and infringement of the defendants' constitutional rights, and not because of any evaluation by it of the guilt or innocence of the defendants. The district court's written order (Pet. App. B-1 to B-8) was based solely on its determination that two alien witnesses had been unavailable to the defense from

the outset of the case through the first three days of trial and that the witnesses' unavailability was a result of governmental action. The district court's oral ruling granting the motions to dismiss and for judgments of acquittal, delivered at the close of the hearing on the unavailable witnesses, was based on the same ground (Tr. 1511, 1518, 1521, 1532):

> There are only two cases that bear on the subject, *Mendez-Rodriguez* and its progeny * * * *Tsutagawa* * * *
>
> * * * * *
>
> [I]n this case what the INS did doesn't meet the constitutional requirements.
>
> * * * * *
>
> * * * I say the fault lies upon the government. The government didn't meet the constitutional requirements.
>
> Therefore my order is, if there is a motion to that effect—
>
> [Defense counsel #1]: Yes, Your Honor, to dismiss.
>
> [Defense counsel #2]: To dismiss.
>
> The Court: Motion for judgment of acquittal—
>
> [Government counsel]: Your Honor—
>
> The Court: —Granted. So ordered.
>
> * * * * *
>
> The Court: All defendants all counts.
>
> * * * * *
>
> [Government counsel]: Your Honor, there has been no finding of guilt or innocence in the case.

The Court: I don't care. You said that before. I heard it. I granted the motion to dismiss.

[Government counsel]: To dismiss the indictment.

The Court: That's correct.

[Government counsel]: It seems to me the proper procedure, by virtue of the fact we're in the middle of the trial, is that, so that society can have a determination—

The Court: If you want a judgment of acquittal, I'll do that, too.

[Defense counsel #2]: I'll so move.

[Defense counsel #1]: Thank you, Your Honor.

The Court: Then you can take them both up there.

[Government counsel]: The motion for judgment of acquittal—

The Court: Dismissed and judgment of acquittal is entered.

* * * * *

The Court: On the motion of the defendants.

[Government counsel]: It's totally improper, Your Honor.[3]

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[3] This colloquy precludes petitioner's suggestion (Pet. 11-12) that the district court entered the judgments of acquittal only in response to government counsel's "insistence that 'society' deserved a determination of innocence or guilt." The above-quoted colloquy demonstrates that the impetus for a judgment of acquittal originated with the district judge, who entered the judgment "[o]n the motion of the defendants."

There was no evaluation of the sufficiency of the government's case and no discussion of the inadequacy of the government's proof as to any element of the offenses charged.[4] The *Mendez-Rodriguez* rule on witness unavailability on which the district court relied, like the pre-indictment delay rule involved in *Scott*, requires termination of the prosecution irrespective of the defendant's guilt or innocence.[5] Accordingly, the court of appeals correctly held that the govern-

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[4] The district court's statements (Pet. App. B-6; Tr. 1548) to the effect that its ruling was based upon a determination of facts suggests nothing to the contrary, since "an appeal is not barred simply because a ruling in favor of a defendant 'is based upon facts outside the face of the indictment.'" *United States* v. *Scott*, *supra*, 437 U.S. at 96, quoting *United States* v. *Wilson*, 420 U.S. 332, 348 (1975). "Rather, a defendant is acquitted only when 'the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements *of the offense charged.*'" 437 U.S. at 97, quoting *United States* v. *Martin Linen Supply Co.*, *supra*, 430 U.S. at 571 (emphasis added). Thus, the fact that the "judgment of acquittal" was based on the district court's resolution of factual issues concerning the unavailability of the alien witnesses and the materiality of their testimony is irrelevant to the question whether the entry of that judgment barred the government's appeal.

[5] Moreover, although not determinative of the issue (see *Fong Foo* v. *United States*, 369 U.S. 141 (1962)), the fact that the government had not completed the presentation of its case also supports the court of appeals' conclusion (Pet. App. A-11) that the "judgment of acquittal" entered by the district court was not a determination that the government's evidence was legally insufficient, but rather "was based on constitutional grounds arising from the unavailability of potential material witnesses."

ment's appeal was not barred by the Double Jeopardy Clause.[6]

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[6] Petitioner's reliance on *Fong Foo* v. *United States, supra,* is misplaced. In that case, a district court ordered mid-trial judgments of acquittal based upon one or both of two grounds: allegedly improper conduct by the Assistant United States Attorney prosecuting the case and lack of credibility ~~of the~~ government's witnesses that had testified up to that point. This Court held (369 U.S. at 143) that even if the acquittal were "based upon an egregiously erroneous foundation," such an acquittal (one presumably predicated on a district court's evaluation of the credibility of the government's witnesses) was not subject to review. In a concurring opinion, Mr. Justice Harlan noted (369 U.S. at 143-144) that if the acquittal had been based solely on prosecutorial misconduct, review and retrial would not have been barred by the Double Jeopardy Clause. Since the district court in this case made no determination of the credibility of the government's witnesses or other evaluation of the sufficiency of the evidence, *Fong Foo* does not establish that the present appeal is barred. Moreover, to the extent it did, it would be flatly inconsistent with the subsequent decision in *Scott.*

Nor does *United States* v. *Martin Linen Supply Co., supra,* or *Sanabria* v. *United States,* 437 U.S. 54 (1978), avail petitioner. In those cases, this Court merely reiterated and applied the proposition that an acquittal is "a resolution, correct or not, of some or all of the factual elements of the offense charged." 430 U.S. at 571; 437 U.S. at 71, quoting *Lee* v. *United States,* 432 U.S. 23, 30 n.8 (1977) and *United States* v. *Martin Linen Supply Co., supra,* 430 U.S. at 571. Having found that the district courts' actions in those cases represented resolutions of at least one factual element of the offenses charged, the Court held that the *Fong Foo* rule preventing appeals and retrial applied. Since there was no resolution of any factual element of the offenses charged herein (see pages 4-7 & nn.4-5, *supra*), neither *Fong Foo, Martin Linen,* nor *Sanabria* controls.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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